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IN THE

Supreme Court of The United States

October Term, 1964

OTTO C. BOLES, Warden of the
West Virginia State Penitentiary,
Petitioner

vs.

ERNEST STEVENSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	3
Statement of Case	3
Reason for Granting Writ	6
Conclusion	9

AUTHORITIES CITED

Culombie v. *Connecticut*, 367 U. S. 568, 6 L. Ed. 2d 1037	8
Erhart v. *Commonwealth*, 9 Leigh (Va.) 671	7
Haynes v. *Washington*, 373 U. S. 503, 10 L. Ed. 2d 513	8
Jackson v. *Denno*, ... U. S. ....., decided June 22, 1964	6, 8
Silber v. *United States*, 370 U. S. 717, 8 L. Ed. 2d 798	8
Smith v. *Commonwealth*, 10 Gratt (Va.) 743	7
State v. *Brady*, 104 W. Va. 523, 140 S. E. 546	7
State v. *Goldizen*, 93 W. Va. 328, 116 S. E. 687	7
State v. *Richards*, 101 W. Va. 136, 133 S. E. 375	7
State v. *Smith*, 32 N. J. 501, 161 A. 2d 520	7
State v. *Vance*, 146 W. Va. 925, 124 S. E. 2d 252	7
State v. *Woods*, 92 W. Va. 331, 115 S. E. 470	7
Thomas v. *Arizona*, 356 U. S. 390, 2 L. Ed. 2d 863	7
Upshur v. *Commonwealth* (Va.), 197 S. E. 435	7

APPENDIX

	Page
Opinion by Honorable Charles F. Paul, Judge of United States District Court	1-A
Order of Discharge by District Court	17-A
Opinion by United States Court of Appeals	19-A
Instructions given in the trial court taken from the transcript of the record filed in the District Court as Petitioner's Exhibit Number 1	26-A
Judgment of the Court of Appeals	38-A

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VS.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Otto C. Boles, Warden of the West Virginia Pentitentiary, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on April 28, 1964.

CITATION OF OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia affirming conviction in the Common Pleas Court is reported in 127 S. E. 2d 638. The denial

of certiorari by the Supreme Court of the United States to the West Virginia Supreme Court is reported in 372 U. S. 938, 9 L.Ed. 2d 763. An application to the Supreme Court of Appeals of West Virginia for a Writ of habeas corpus was summarily dismissed. The Opinion of the United States District Court upon a petition for discharge upon a Writ of habeas corpus is reported in 221 F. Supp. 411. The opinion of the Court of Appeals, Fourth Circuit, dated April 28, 1964, is unreported. (See Appendix hereto, P. 19-A.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 28, 1964. The jurisdiction of that Court is invoked under 28 U.S.C., 1254 (1).

QUESTIONS PRESENTED

1. Does the due process clause of the Fourteenth Amendment require the presiding judge in a state criminal trial, after having determined that a confession made by the accused is admissible, to instruct the trial jury that it has the right to redetermine the voluntary character of the confession, and if found involuntary, to reject it.

2. Whether or not it is contrary to the due process clause of the Fourteenth Amendment for a trial judge in a state criminal trial, after having admitted a confession as voluntary, to instruct the jury that it has the right to redetermine the voluntariness of an oral confession and to accept or reject it.

3. Whether or not an oral confession made by the accused was voluntary.

CONSTITUTION INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

The respondent was charged with the murder of one Louise Davis, which occurred on February 5, 1960. He was seen in the vicinity of the place where the crime was committed, and the city police went to the home of his sister where he was staying to interview him. Bloodstains were observed on his watch and clothing and the city police took him into custody. On the way to the police station for further questioning, they stopped the automobile about fifty feet below the building in which the body of the victim was lying, that being the scene of the crime. One of the city police said that they were going to take the respondent into the building; that there was something they wanted to show him. The respondent objected to going into the place. He testified upon his trial that the reason why he did not want to go into the building was due to the fact that numerous of his friends were standing around in the vicinity of the place and this constituted a source of embarrassment for him. The officer in charge indicated his intention to take the respondent into the building unless the respondent told him what he knew about the murder. The officer then said "I want to know now, did you commit this crime", and the respondent replied "Yes, I did; please don't take me inside; take me to headquarters." The respondent, upon his trial, denied that he made the above admission. He was found guilty and the death penalty imposed.

The respondent filed a petition for discharge upon a writ of habeas corpus in the United States District Court for the Northern District of West Virginia, in which he alleged two grounds for discharge:

1. That there was an improper separation of jurors.

2. That the admission in evidence of an oral confession was in violation of due process under the Fourteenth Amendment to the United States Constitution.

The District Court held that it was bound by the State Court finding upon the first ground assigned but concluded that the confession was involuntary and ordered the discharge of the defendant. (See Memorandum Opinion, Appendix hereto, P. 1-A.)

The respondent testified at his post conviction hearing in the United States District Court in support of his petition for discharge by a writ of habeas corpus that he might have made the oral admission but if he did, it was because it was a source of embarrassment for him to get out of the automobile in the presence of his friends and go into the building.

The United States District Court rejected the respondent's explanation for his objection to entering the building as not being his real reason and then proceeded to postulate that it was because the respondent was afraid to face the victim of his crime, and upon that basis, held the confession to be involuntary. (Appendix hereto, P. 13-A.)

The Court of Appeals, Fourth Circuit, in the opinion rendered on April 28, 1964, said "The voluntariness

of the confession—the ground of the District Judge's decision to grant the petitioner conditional release on habeas corpus—we do not reach."

The Court of Appeals then held that failure of the trial court to give the jury a specific instruction, whether requested or not, to the effect that the jury had the right to redetermine the voluntariness of the confession, was a denial of due process. (Appendix hereto, P. 19-A.)

The trial court gave all instructions requested by counsel for the respondent, aggregating sixteen in number, and one instruction requested by the State. (Appendix hereto, P. 26-A.) The instructions given told the jury, among other things, that the jury was the sole and exclusive judge of the evidence and credibility of the witnesses; that it had the right to disregard testimony of any witness or give to same such credit as it was entitled, and that the jury should weigh and consider the evidence of the defendant under the same rules as any other witness and to give to it such weight and credit as they believe the same is entitled to. The respondent did not request an instruction submitting to the jury the right to say whether or not the confession was voluntary. The failure to give such an instruction was not raised at any time, either in the State Courts or in the United States District Court. The question was not properly before the Court of Appeals for decision.

There was no substantial conflict in the testimony of the police officers (Transcript of evidence in Trial Court, P. 126, 132, 147) and the respondent in the

Trial Court. (Transcript of evidence, P. 204.) (Transcript of proceeding in District Court, P. 17-19.)

The respondent was a negro laborer, age 23. He had a seventh grade education. He had served a term in the United States Army. He had been arrested on a felony charge upon one prior occasion. No threats of violence were made against him, and at the place of the confession numerous friends were standing around in the vicinity of the place. He did not request assistanc of counsel. He was not cautioned that he had the right to remain silent or that his statement might be used against him.

REASONS FOR GRANTING THE WRIT

(1) The decision of the Court of Appeals is in direct conflict with *Jackson* v. *Denno*, decided by this court June 22, 1964. In *Jackson* v. *Denno*, the court held that the submission of the right to determine whether the confession was voluntary to the convicting jury was unconstitutional. In this case, the Court of Appeals said:

> "* * * The same end, however, is reached by our view: that in his trial the petitioner was deprived of Fourteenth Amendment due process by the criminal trial court's failure to instruct the jury explicitly that before they could accept the oral confession, they must believe beyond a reasonable doubt that it was given on his own volition." (See Appendix hereto, P. 22-A.)

The rule heretofore observed in West Virginia was for the trial judge to determine whether the confession was voluntary or involuntary. If determined to be involuntary, he rejected it. If determined to be volun-

tary, the confession was admitted in evidence and the jury, when requested, was instructed to the effect they were the judge of the weight and credibility to be given to the confession. *State* v. *Goldizen*, 93 W. Va. 328, 116 S. E. 687 (1923); *State* v. *Richards*, 101 W. Va. 136, 141, 133 S. E. 375 (1926); *State* v. *Brady*, 104 W. Va. 523, 140 S. E. 546, 549 (1927); *State* v. *Vance*, 146 W. Va. 925, 124 S. E. 2d 252, 257.

In *Erhart* v. *Commonwealth*, 9 Leigh 671 (Va. 1939), the court held that it was the duty of the jury to weigh the confession of the defendant like the other evidence and believe or disbelieve it. In *Smith* v. *Commonwealth*, 10 Gratt 734 (Va. 1853), the court held that the trial judge is to pass on the admissibility of the confession, and the jury determine the weight and credibility. The foregoing cases are the law of West Virginia. *State* v. *Woods*, 92 W. Va. 331, 336, 115 S. E. 470. In *Upshur* v. *Commonwealth* (Va. 1938), 197 S. E. 435, 438, and in *State* v. *Smith*, 32 N. J. 501, 161 A. 2d 520, 544, the courts approved the refusal of the lower court to give an instruction submitting to the trial jury the right to say whether the confession was voluntary. The conclusion reached by the Virginia and New Jersey Courts is consistent with *Jackson* v. *Denno*.

In view of the fact that there was no substantial conflict between the testimony of the police officers and the respondent on the trial of the case, the admissibility of the confession became a question of law for the court, *Thomas* v. *Arizona*, 356 U. S. 390, 2 L.Ed. 2d 863.

(2) This court should take note of the failure of the Court of Appeals to decide the question of voluntariness of the confession by virtue of *Silber* v. *United States*, 370 U. S. 717, 8 L.Ed. 2d 798 (1962). The question of whether the oral confession was voluntary or involuntary was the only question before the Court of Appeals. The failure of the Court of Appeals to decide this point has created a difficult situation. The Court of Appeals took note of the fact that the trial court failed to submit the question of the voluntariness of the confession to the jury, and decided the case upon that alone. This decision is contrary to that reached by the Supreme Court of the United States on June 22, 1964, in *Jackson* v. *Denno*. The respondent is now subject to the judgment of the Court of Appeals remanding the case back to the District Court for release upon a writ of habeas corpus, whereas the question forming the basis of the appeal remains undecided.

It is contended that the oral confession made by the respondent was voluntary. If this court does not assume jurisdiction and determine the question of voluntariness of the confession, it will then be necessary to remand the case back to the Court of Appeals for a determination of this question. We contend that it is important that this question be decided before any other proceedings are had in the case. The testimony of the respondent before the United States District Court at the post-conviction hearing discloses that there was insufficient coercion to over-power the respondent's will to resist. (See transcript of evidence in United States District Court, Pages 16 to 20, inclusive.) *Haynes* v. *Washington*, 373 U. S. 503, 10 L.Ed. 2d 513; *Culombe* v. *Connecticut*, 367 U. S. 568, 6 L.Ed. 2d 1037.

CONCLUSION

For the foregoing reasons, we conclude as follows:

1. That this court should grant certiorari and reverse the judgment entered by the Court of Appeals of the Fourth Circuit on April 28, 1964, and then decide the question as to whether or not the oral confession made by the respondent was voluntary or involuntary, or

2. That this court should grant certiorari and reverse the judgment entered by the Court of Appeals herein on April 28, 1964, and remand this case to the Court of Appeals with the direction to determine whether or not the oral confession was voluntary or involuntary.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA AT WHEELING

ERNEST STEVENSON,
Petitioner,

vs.

OTTO C. BOLES, Warden of the West Virginia State Penitentiary,
Respondent.

Civil Action
File No. 1243-W
Habeas Corpus

Tom T. Baker, Huntington, West Virginia,
For the petitioner.

Claude A. Joyce, Assistant Attorney General,
For the respondent.

PAUL, Charles F., Judge

OPINION

Ernest Stevenson is under sentence of death, by electrocution, for first degree murder. Execution has been stayed pending the disposition of these proceedings. The order of conviction was by the common pleas court of Cabell County on September 22, 1960, after a trial in which the jury returned a verdict of guilty

of first degree murder without recommendation of mercy. The conviction was affirmed, on appeal, by the Circuit Court of Cabell County, and, ultimately, by the Supreme Court of Appeals of the State of West Virginia, on July 3, 1962, by a divided court. The Opinion of the Supreme Court of Appeals and the dissenting Opinion by Judge Haymond are reported in 127 S. E. 2d beginning at page 638. The Supreme Court denied certiorari (372 U. S. 938).

Petitioner attacks the conviction on two grounds: (1) That he was not accorded due process and a fair trial because the jury, while ordered sequestered, was improperly supervised and that certain of the jurors were permitted outside contacts which may have subjected them to improper influences; and (2) that the court improperly admitted, over objections, the testimony of three police officers with reference to an alleged oral confession, which confession, if made, was coerced and not voluntary.

At the outset, the State urges that the alleged errors, both procedural and involving issues of the State and Federal Constitutions, have been fully considered and decided upon direct appeal, and that this court has no jurisdiction to review them upon collateral attack, and should give binding effect to the decision of the Supreme Court of Appeals in this case.

It is true, of course, that, under our system of dual federalism, the State courts as well as the Federal apply the principles of the United States Constitution. This court labors under no delusion that he acts as a reviewing court over the highest court of the State. On the other hand, with reference to federal questions,

and particularly the fundamental law, this court has certain inescapable duties. His duties in this case are made crystal clear by the recent pronouncements of the Supreme Court in *Townsend* v. *Sain*, decided March 18, 1963, 372 U. S. 293, 9 L ed 2d 770. The Chief Justice, speaking for the court, at page 318 of the U. S. Report (789 of the L ed Report) said:

> "Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas."

In performance of his inescapable duties, this court will follow this mandate and will give to the findings of fact of the State courts, where fairly determined and supported by the record, binding effect, and will give to the conclusions of law of the Supreme Court of Appeals the persuasive effect of the reasoning explained in the language employed—he can do no more.

Guided by these principles, it becomes apparent that the petitioner's first attack upon the conviction must fail in this court. The Supreme Court of Appeals held that, under applicable West Virginia law, it is the burden of the defendant to show prejudice resulting from any failure of the custodial officers to keep the jury properly sequestered, even in capital cases, and that no such prejudice is here shown. The State law has been authoritatively determined, and certainly the record falls far short of showing that the jurors were sub-

jected to improper influences which might render the accused's trial violative of the tests of fundamental fairness inherent in due process. In fact, if the State law permitted complete separation of the jurors, even this would not seem to violate due process. Mr. Justice Holmes, in *Holt* v. *U. S.* (1910), 218 U. S. 245, at 250 and 251, 54 L ed (1021, at 1029), observed that there is no federal requirement that a jury be kept sequestered, even in a capital case, and that a good number of the States have no such requirement.

The second of the petitioner's contentions, involving the alleged oral confession, presents very more serious and difficult questions. The facts are without substantial dispute, and, as set forth in the majority and dissenting Opinions of the Supreme Court of Appeals, are substantially supported by the record, and were not, in any material respect, challenged in the hearing in this court. A short restatement of the facts seems appropriate here.

The petitioner is a negro, possessed of a seventh grade education, and 23 years old at the time of the alleged offense. He had no previous record of crimes involving violence, but he had been convicted of a misdemeanor involving the unauthorized use of a car. His only work experience was irregular employment as a handyman. He had served 2½ years in the army as an "ammo carrier", and never advanced beyond the rank of private. On the evening of February 4, 1960, the accused consumed a pint of whiskey at his sister's home, where he resided, between 10:00 P. M. and midnight. He went out shortly after midnight and, after walking some blocks, found a storeroom, housing a fish market, lighted and the front door open, and he entered.

The fish market was in charge of one, Louise Davis, a mature negro woman.

At about 11:00 A. M. February 5th, the owner of the fish market returned to open up for the day and found the front door closed but not locked. After entering, he discovered the body of Louise Davis back of a partition which divided the storeroom into two parts, brutally murdered. Her skull had been crushed, her lung pierced, her jaw broken and her face and nose lacerated and broken. She was covered with blood. Her clothing had been disarranged; a panty girdle had been pulled off and was still attached to the stocking on one leg, which stocking had been turned inside out. Spermatozoa were found in her vagina.

Stevenson had been seen in the fish market at about 12:25 the morning of the 5th by one witness. Another witness saw him at about 1:10 A. M. standing in the open doorway. Another witness saw him a few minutes later walking away from the vicinity of the fish market.

About noon on February 5th three uniformed policemen, in a police cruiser, arrived at the home where Stevenson was staying and placed him under arrest, announcing that they wanted him to go to headquarters to answer questions about a murder. As the four were proceeding in the cruiser enroute to the police station, one of the policemen suggested that they make a short detour and stop at the fish market. They stopped at the curb about 50 feet from the entrance. The body of the victim had not been removed from the premises, but this fact was not communicated to Stevenson by the police. One of the officers told Stevenson they were going to take him into the fish market; that there was

something they wanted to show Stevenson. Stevenson demurred and the police insisted. Again Stevenson pleaded with the police not to take him in, saying that there were a lot of people around there and he didn't want to go in. The police again announced their intention of taking him in, and Stevenson said that it would not be necessary, that he would make a statement and tell the officers all they wanted to know when they got to the police station. The police started to take the accused inside and Sergeant Tomlinson told the accused that he would have to tell them now or they were going to take him inside. Tomlinson testified that he then said "I want to know now did you commit this crime" and that the accused said "yes, I did, please don't take me inside, take me to headquarters." The police then took Stevenson to headquarters where, after what must have been a very short period of questioning, the accused made a statement, which was transcribed and signed. This statement recited that it was given voluntarily with the knowledge that it might be used in court against him, and, when introduced, no objection was made by the defense. The statement recited the drinking of the whiskey, his entry into the fish market, and "the next thing I remember I was walking across the street with this hammer in my hand." He hid the hammer in a garbage can in an alley, and the hammer was found by following the directions Stevenson gave. It was covered with blood, and was identified as having come from the fish market. In continuation of the statement, Stevenson told about his walking around until about 3:00 o'clock in the morning, when he went to bed, his awakening at about 11:35 and discovering his clothing blood spattered. He denied having made the oral confession and insisted that he had no recollec-

tion of events between the times he entered and left the fish market.

At the trial, and again at the hearing in this court, Stevenson maintained the version of the events recounted in his written statement, except that at the hearing here, he did admit that he might have made the oral confession. At the hearing in this court, he elaborated on the fact that there were a great number of people on the sidewalk around the fish market and people going in and out; that many of them were his friends, and explained that his extreme reluctance to go into the fish market in custody of the police resulted from the fact that he did not want to be embarrassed before his friends. He negatived any fear of mob violence, and insisted that he did not know what was in the fish market or what the police wanted to show him.

It is conceded that, under both West Virginia law and the Federal Constitution, a confession, in order to be admissible in a criminal trial, must have been "voluntary". It is incumbent upon the court at the outset to determine what the test of a voluntary confession is under the applicable rules, in order that the admissibility or nonadmissibility of the oral confession in this case may be judged by the application of proper standards.

Professor Wigmore, in his exhaustive consideration of the subject, in Wigmore on Evidence, Third Edition, Volume III, pages 228 through 360, argues persuasively that the admissibility of pre-trial confessions is a rule of evidence directed, as are other rules of evidence, at the trustworthiness of the confession as evidence; that the testimony is to be rejected when it has

been elicited by an inducement, whether by the application of physical force, the threat thereof, psychological forces or tricks or by false pretenses or promises sufficiently powerful or persuasive as to create a liklihood that an innocent person, under the circumstances, might make a false confession; and that the testimony should be received if the inducement is not of such force. He states the advocated test compendiously (at page 252) as follows:

> "Was the inducement such that there was any fair risk of a false confession?"

He even contends that, applying the proper test, if science establishes their infallibility, a confession obtained by unconsented-to use of hypnotism, truth serum or, presumably, the polygraph, would be admissible (see Section 841-a), since the objective is the ascertainment of truth and the protection of the innocent, not an exclusionary rule to protect the guilty. Professor Wigmore argues logically and recites respectable authority, and no doubt, his views would be echoed by many sociologists and especially by the heads of investigative and law enforcement agencies.

It is apparent, from a reading of the Opinion of the majority in *State* v. *Stevenson*, that the West Virginia Supreme Court of Appeals used the Wigmore test. It quotes, with approval, from *State* v. *Brady*, 104 W. Va. 523, 140 S. E. 546 (1927), as follows:

> "The real question in every case as to whether or not a confession is admissible is whether or not the confessing mind was influenced in any way to create a doubt as to the truth of the con-

> fession, and over this doubt or question, the trial court has a wide discretion, and this discretion will not ordinarily be disturbed on review.";

and from *State* v. *Goldizen*, 93 W. Va. 328, 336, 116 S. E. 687 (1923):

> "The real question being whether there has been any threat or promise of such nature that the prisoner would likely tell an untruth for fear of the threat, or hope of profit from the promise.";

and from Greenleaf on Evidence, Volume 1, § 219, as follows:

> "The only proper question is whether the inducement held out to the prisoner was calculated to make his confession an untrue one."

Weighed in this balance, the court found that the police actions were not of sufficient force or effect as would likely produce a false confession, and that the oral confession of Stevenson was, therefore, voluntary and admissible, and that no error was committed, even though the trial court conducted no preliminary hearing on the question of the voluntariness of the confession and did not even instruct the jury on that subject.

This court is forced to the conclusion that the majority Opinion in *State* v. *Stevenson* applied an improper and unjustifiably limited test to the facts and circumstances.

As early as 1897, the Supreme Court in *Bram* v. *U. S.*, 168 U. S. 532, 42 L ed 568, in a case involving a

federal prosecution for murder, pointed out that the exclusionary rule is available to a guilty person as well as an innocent one, and that it is not concerned with innocence or guilt or with the truth or falsity of the confession; that it is a personal right of the accused akin to the Fifth Amendment privilege against self-incrimination. The Court states the rule (at page 549 of the U. S. Reports, 567 of the L ed Report) as follows: "(i)t (the proof) must be sufficient to establish that the making of the statement was voluntary; that is to say, that from causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent."[1]

For the various statements of the federal test contained in the myriads of Supreme Court decisions on this subject,[2] one need but examine the alternative statements of the test in the latest of the Supreme Court opinions in *Haynes* v. *Washington*, ... U. S. ....., 10 L ed 2d 513, decided May 27, 1963, in which the court quoted from *Lynumn* v. *Illinois*, 372 U. S. 528, 9 L ed 2d 922 (1963): "(t)he question in each case is whether the defendant's will was overborne at the

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1. In his note to Section 831 Wigmore on Evidence, Professor Wigmore criticizes *Bram* and the rule which it enunciated in language which can only be characterized as intemperate. He concludes his comments with the following: "(h)ow much longer will that misguided and unrepudiated opinion continue to cloud the reputation of the Federal Supreme Court?" Professor Wigmore's question has been answered by the long line of Supreme Court decisions on this matter to and including its Opinion in *Haynes* v. *Washington*, 10 L ed 2d 513, decided May 27, 1963.

2. In footnote 2 of the Opinion in *Spano* v. *New York*, 360 U. S. 315, 3 L ed 2d 1265 (decided in 1959), the court cites 28 Supreme Court Opinions on the subject. *Spano*, by no means, ended the Supreme Court's work in this field—see the later cases cited in *Haynes* v. *Washington*, supra.

time he confessed,", and from *Wilson* v. *U. S.*, 162 U. S. 613, 40 L ed 1090 (1896): "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." It is clear also that the fact that the defendant denies having made the confession has no bearing on its admissibility or inadmissibility, see, e.g., *Lee* v. *Mississippi*, 332 U. S. 742, 92 L ed 330 (1948); that the fact that there is other evidence sufficient to convict is of no moment, see, e.g., *Lyons* v. *Oklahoma*, 322 U. S. 596, 88 L ed 1481 (1944); and that the pressures and inducements may be psychologically coercive as well as physical, see, e.g., *Watts* v. *Indiana*, 338 U. S. 49, 93 L ed 81 (1949) and *Blackburn* v. *Alabama*, 361 U. S. 199 (1960). It is also plain that, while by no means determinative, the facts that the accused has not been advised of his right to remain silent; of the fact that his statements may be used against him in court or that he is entitled to representation by counsel, may be considered, among the other circumstances, in weighing the voluntariness of the confession, see, e.g., *Turner* v. *Pennsylvania*, 338 U. S. 62, 93 L ed 1810 (1949); *Haley* v. *Ohio*, 332 U. S. 596, 92 L ed 224 (1948); and *Payne* v. *Arkansas*, 356 U. S. 560, 2 L ed 2d 975 (1958).

At least since *Brown* v. *Mississippi*, 297 U. S. 278, 80 L ed 682 (1936), it has been established that the federal rule and test of admissibility is not simply a pronouncement by the Supreme Court, under its supervisory powers applicable to federal trials, but that it is a fundamental right embraced within the concept of the phrase "due process of law", as used in the Fourteenth Amendment, and as such, it must be recognized and applied by State courts in State prosecutions.

The fact that the Supreme Court has had to deal with this subject so frequently may be explained by the difficulty with which any court is faced in applying the test. It is subjective both with respect to the mind of the accused and, it must be admitted, with respect to the mind of the judge. As the court said in *Haynes*, "The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychological coercive pressures and inducements on the mind and will of an accused." The mind of the judge may consciously or unconsciously be influenced by his sociological views with reference to the competing interests of the effective administration of criminal justice on the one hand, and the individual rights of an accused—particularly a guilty one—on the other.

Having considered the applicable rules that outline the considerations apposite thereto, we should now proceed to a consideration of the police actions and Stevenson's reactions in this case.

It seems patent that Stevenson's explanation as to why he capitulated to the importunities of the police are unimpressive. To be consistent with his position at the trial, Stevenson was obliged to admit that he had no knowledge of what might be inside the fish market, and, to explain his reluctance to enter, he urges the embarrassment of being seen in police custody by many of his friends. The prospects of such embarrassment cannot be judged of sufficient force to elicit a confession from anyone—guilty or not guilty—who had a real will to remain silent. It is inconceivable that any-

one, to escape the appearance of criminal involvement, would assume the obloquy consequent upon a confession of guilt. Certainly no embarrassment is avoided that way.

Disposing thus of the petitioner's contention does not, however, end this court's duties in the case—he cannot close his eyes to the real reason why the petitioner made his oral confession. That the petitioner had a will not to confess is apparent from his repeated requests not to be taken into the fish market; his efforts to avoid that threatened action by undertaking to tell police what they wanted to know at police headquarters, and his final capitulation when all else had failed. What he meant by telling the police he would make a statement when he reached headquarters is made clear by what he did say after he arrived at headquarters. There he not only refused to confess his guilt, he insisted that he had no knowledge of the crime, and even denied that he had made the prior oral confession.

It is, perhaps, ironic that, in order to find the exertion of sufficient pressure to overcome free will, it is necessary for this court to postulate the petitioner's guilt or, at least, his guilty knowledge of the crime, since, if he did not have guilty knowledge of what lay within, the threats of the officers to take him in the fish market would not have sufficient force to coerce a genuine will to remain silent or to affirm innocence.

The necessary postulate is not hard to arrive at. The evidence, other than the oral confession, seems amply sufficient to establish, beyond a reasonable doubt, the petitioner's guilty knowledge, and, at the very least, his complicity in the crime or crimes. His defense of tem-

porary amnesia is not worthy of credit, and the jury gave it none. This is not a case in which it is sufficient to say that the applicability of the federal exclusionary rule takes no account of the guilt or innocence of the accused, since here the assumption of guilt is necessary to bring the rule into play. The case points up more vividly than any other which counsel have cited or the court has found, the essential difference between the Wigmore test and that spelled out by the Supreme Court cases.

With the finding that the petitioner knew what he was to see if the police carried out their threats, the conclusion is compelled that those threats were of sufficient force to overbear his will. Given the petitioner's background and his physical condition of recovering from the intoxication and the emotional trauma of a few hours before, it requires no imagination to find the necessary psychological coercion. The petitioner's description of his condition as being "all turned around" is understatement. His revulsion at the prospect of being compelled to view the repulsive product of his handiwork would overcome a stronger will than his. This court cannot escape the conclusion that the admission into evidence, over objection, of the testimony of the three officers with reference to the oral confession, was in derogation of the petitioner's constitutional rights and privileges.

The factual variations in the numerous cases which have been examined by the court are so wide that it is hardly helpful to attempt a comparison with the facts and circumstances in this case. They range all the way from police brutality, or the third degree, through a few hours of intermittent questioning while denying

the accused the right to call counsel. The case of *Davis* v. *U. S.*, 32 F. 2d 860 (9 Cir. 1929), presents some striking similarities. Davis (a Klamath Indian), was convicted of first degree murder. On questioning by a special agent of the FBI, he refused to confess his guilt, maintaining self-defense. He was then taken to the morgue in the nighttime and held in the presence of the dead body of the victim. After about three-quarters of an hour, he broke down and confessed. Admission of the confession was held, by the majority of the court, to be in violation of the accused's constitutional rights, and a new trial ordered, the majority Opinion observing (at pp. 863 and 864), "After a somewhat extended investigation of the subject, we have found a single instance where an officer took a prisoner to the morgue to register the reaction, and in that case the conduct of the officer was well described by an able judge as 'the theatrical dime-novel folly of an overzealous officer'." The case has further aptness with reference to the case at bar in that the dissenting judge found the confession to be voluntary by application of the Wigmore test.

There remains only to be considered the ultimate disposition of the case. Stevenson is entitled to a trial free of constitutional infirmities—no more and no less. This court is considerably concerned by an expression used in a recent opinion by the West Virginia Supreme Court of Appeals in the case of *State ex rel. Banach* v. *Boles*, ... W. Va. ....., 131 S. E. 2d 722, decided July 9, 1963. That case involved a petition in habeas corpus in which the court found that the failure of the State to furnish the petitioner with a transcript of the evidence when, as an indigent, he made timely request for such transcript for the purpose of taking an appeal,

was a denial of his rights under the United States Constitution. In disposing of the case, the majority Opinion says, at page 728, "(i)n the absence of any power in this Court to supply such deficiency at this date, the time for appeal having expired, or *to order a new trial*, petitioner is entitled to his release. * * *." (Emphasis supplied).

No reason is given for the underscored clause. It may be that the court feels that, in State habeas corpus proceedings, it is limited, in the disposition of the case, to the alternatives expressed in the statute (Code 53-4-7, Michie's Code, Section 5330) and so abnegates its inherent powers. If this be so, it should have no application when the judgment and sentence is voided by federal court for a denial of a constitutional right and a new trial is afforded as an alternative to release, in compliance with the constitutional mandate. Certainly, the inhibition adopted by the Supreme Court of Appeals cannot be on the theory that a new trial would constitute double jeopardy, see, e.g., *U. S. ex rel. Jones v. Nash*, 264 F. 2d 610 and the annotation in 97 A.L.R. 160.

Be that as it may, it is the duty of this court to order the release of Stevenson and to stay the execution of the order for a reasonable time to permit the State, if it can, to afford Stevenson a new and constitutionally unexceptional trial. Counsel will be heard at their earliest convenience, not later than September 12th, on the question of fixing such reasonable time.

September 5, 1963.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA AT WHEELING

ERNEST STEVENSON,
Petitioner,

vs.

OTTO C. BOLES, Warden of the West Virginia State Penitentiary,
Respondent.

Civil Action
File No. 1243-W
Habeas Corpus

ORDER OF RELEASE

Pursuant to the request contained in the Opinion of this court filed herein September 5, 1963, the petitioner appeared by his counsel, Tom T. Baker, and the respondent by Claude A. Joyce, Assistant Attorney General, for the purpose of a hearing on fixing a reasonable time within which any Order of Release should be stayed pending the State's affording the petitioner a new trial. Mr. Joyce represented to the court that the State desires to take an appeal to the United States Court of Appeals for the Fourth Circuit from any Order of Release entered herein. Mr. Joyce also represented that notice of appeal and motion for a certificate of probable cause will be filed within a few days, and this court indicated that it is disposed to certify probable cause.

It appearing to the court that, under these circumstances, consideration of a proper time to allow for a new trial is inappropriate, and that the stay should be related to the time necessary for the proceedings on appeal, it is, accordingly,

ADJUDGED, ORDERED and DECREED that, for the reasons and upon the findings and conclusions stated in the Opinion of this court filed September 5, 1963, the judgment of conviction and committment entered by the Common Pleas Court of Cabell County, West Virginia, on September 22, 1960, is void and of no effect, and the respondent shall release petitioner, Ernest Stevenson, from custody. The execution of the Order of Release is stayed pending disposition of the appeal from this Order and until further order of the court after receipt by this court of the mandate of the appellate court.

ENTER: September 12, 1963

CHARLES F. PAUL

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9202.

Ernest Stevenson,
Appellee,

versus

Otto C. Boles, Warden of the
West Virginia State Penitentiary,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT WHEELING. C. F. PAUL, DISTRICT JUDGE.

(Argued January 21, 1964. Decided April 28, 1964.)

Before SOBELOFF, Chief Judge, and BRYAN and J. SPENCER BELL, Circuit Judges.

Claude A. Joyce, Assistant Attorney General of West Virginia, (C. Donald Robertson, Attorney General of West Virginia, on brief) for Appellant, and Ronald P. Sokol, [Court-assigned counsel] (Tom T. Baker, Court-assigned counsel, on brief) for Appellee.

PER CURIAM:

This is an appeal by the State of West Virginia from an order of the District Court directing that the prisoner Ernest Stevenson be released or retired within a reasonable time. The District Court found that the prisoner's constitutional rights had been violated by the introduction at his original trial of a coerced oral confession. The District Court's opinion is published at 221 F. Supp. 411.

On February 5, 1960, at 11:00 a.m. the body of Louise Davis was found lying in a pool of blood in the back room of the Atlantic Seafood Shop in the city of Huntington, West Virginia. She had been brutally murdered at about 1:00 o'clock that morning. Her head was crushed and both jaws broken. She had a stab wound in the chest, and there were indications that she had been raped. The owner of the shop testified that $42.00 was missing from the cash register. Shortly after the crime was discovered the police learned that the prisoner and an unidentified man had been observed at the scene of the crime at about the time fixed for the death. They went to the prisoner's sister's home, where he was residing, and took him into custody. Instead of taking him directly to the police station they "detoured" by the scene of the crime. The state's brief succinctly sets forth what happened thereafter.

> "The police arrived on the scene shortly after 11:00 a.m. Three members of the police force, namely, Joe Coleman, B. T. Tomlinson, and Don L. Salyers, took the petitioner into custody at his home on 28th Street, and conveyed him by automobile from his home down 8th Avenue to

a point about fifty feet from the Atlantic Seafood Shop, at which time officer Tomlinson asked the petitioner if he committed the crime, and then indicated he was going to take him into the establishement. The petitioner said, don't do that, that he would tell the officers what they wanted to know when they arrived at the police station. Officer Tomlinson then said to the petitioner, 'I want to know now, did you commit this crime,' to which the petitioner replied, 'Yes, I did, please don't take me inside, take me to headquarters.'

"Policeman Joe Coleman testified that the petitioner said, 'I don't want those people to look at me.' Policeman Don Salyers testified that the petitioner said, 'he didn't want to face all those people.' The petitioner, at the trial in the Common Pleas Court, gave substantially the same version as to what happened near the Atlantic Seafood Shop as that given by the police officers. He denied, at the trial, that he admitted that he killed the woman.

"The post-conviction hearing was held in the District Court of the United States for the Northern District of West Virginia on August 28th, 1963, upon the petition for a writ of habeas corpus, at which time the petitioner testified that at the time the police officers conveyed him to the vicinity of the Atlantic Seafood Shop there was a large group of people in front of the fish market, all of whom were friends of his, and that he did not want to face all those people, or

for them to see him under arrest. He further stated that it was a source of embarrassment to him.

"At the post-conviction hearing the petitioner testified that he might have admitted that he killed the deceased.

"The petitioner also testified that he was twenty-three years old at the time of the crime. He had a seventh grade education. He had spent three years in the Army. His prior criminal record was one arrest for a felony, which was reduced to a misdemeanor." [His offense was the unauthorized use of a car.]

The voluntariness of the confession—the ground of the District Judge's decision to grant the petitioner conditional release on habeas corpus—we do not reach. Hence we do not pass upon the right or wrong of the Court's findings and conclusions. The same end, however, is reached by our view: that in his trial the petitioner was deprived of Fourteenth Amendment due process by the criminal trial court's failure to instruct the jury explicitly that before they could accept the oral confession, they must believe beyond a reasonable doubt that it was given on his own volition.

Without his disclosure, it is possible that guilt could not have been found. Though perhaps too tardily interposed to require a preliminary hearing on the issue, *cf. United States* v. *Denno*, 309 F.2d 573 (2 Cir. 1962), *cert. granted*, 371 U.S. 967 (1963); *Wilson* v. *Sigler*, 285 F.2d 372, 377 (8 Cir. 1961); *United States* v. *Aviles*, 274 F.2d 179, 192 (2 Cir.) *cert. denied*, 362

U.S. 974, 362 U.S. 982, *rehearing denied*, 363 U.S. 858 (1960); *United States* v. *Bando*, 244 F.2d 833, 845-46 (2 Cir.), *cert. denied*, 355 U.S. 844 (1957); but see *Crosby* v. *United States*, 314 F.2d 238 (D. C. Cir. 1962); *State* v. *Brady*, 104 W. Va. 523, 140 S. E. 546, 549 (1927), nevertheless objection to the statement was voiced at trial with respect to voluntariness. Thus, the defendant's freedom of will at the time became an issue in the case. True, defense counsel made no request for a specific instruction, but with the proof of guilt pivoted upon the acknowledgment of guilt and with the question of voluntariness plainly before the Court, it was indispensable to fairness of trial that the jury be specially counselled on the point.

Involuntariness, it is hornbook, drains a confession of every modicum of legal acceptability irrespective of its truth. Any conviction which it has tainted is instantly condemned by the due process clause. See, *e.g.*, *Blackburn* v. *Alabama*, 361 U.S. 199, 210 (1960); *Brown* v. *Mississippi*, 297 U.S. 278, 285-86 (1936). But it is not enough simply to concede this potential infirmity. Unconstitutionality to be fully and squarely honored must be communicated to those who are searching for the truth, thereby revealing any possible defilement. See *New York Times Co.* v. *Sullivan*, ... U.S. ..... (1964). Therefore, it seems elementary that the authorities outlawing an induced confession must be read as requiring an exposition of this constitutional exaction to the jury. Otherwise, the accused is accorded no more than an academic acknowledgment of this fundamental precept. Just that occurred here.

The Court was aware of this great safeguard to the accused, the prosecution was mindful of it, defense at-

torneys knew it, but the jury was never authoritatively instructed upon it. That it is our duty to insure that a "state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary" in satisfaction of the due process clause was recognized in *Lyons* v. *Oklahoma*, 322 U.S. 596, 601 (1944).

The instant instructions did not satisfy this right of the defendant. They embraced, generally, the doctrines of reasonable doubt; the jury as the sole judge of a witness' credibility; there right to disregard any part of the evidence thought untrustworthy and the accused's entitlement to a fair consideration of his own testimony. Under this submission, the jury could well have believed the officers' narration of the accused's owning up to the crime to be accurate and precise, and yet not evaluate the incrimination with regard to the willingness or coerciveness with which it came. Again, the jury could have disbelieved the defendant's denial that he made the utterance, and yet not understood that the *fact* of the confession is not enough—that it must also have been forthcoming of his own choosing.

While the absence of a *voir dire* examination on the defendant's volition in respect to such a statement has been excused as not a deprivation of rights, this relaxation apparently is premised on the granting of an instruction to the effect that an absolutely essential prerequisite, to the jury's consideration of a confession, is that the jurors first find it althogether free of constraint upon the confessor. *Stein* v. *New York*, 346 U.S. 156, 170, 173, 192 (1953). Although not Fourteenth Amendment cases, *Crosby* v. *United States*,

supra, and *Smith* v. *United States*, 268 F.2d 416 (9 Cir. 1959), reiterate the indispensability of such an instruction. In the latter decision this was said, at p. 421:

> "But there is a second [that is, after the preliminary inquiry] phase to this determination. Defendant has a right to have the jury pass upon the question of whether the admissions made by him were coerced or were made freely. The *jury should be instructed* that, unless they find beyond a reasonable doubt that the confession was freely and voluntarily made, they should not give any consideration to the admission in weighing guilt or innocence of defendant. It is true that the failure to give such an instruction and submit this question to the jury would not be noted by us if the matter had not been called to the attention of the trial court and exception taken to the failure.
>
> "The situation in the case was such that these two failures were vital. *The jury had before it admissions of defendant and had not been admonished that there was any question* of fact for them to consider in that connection. . . ." (Accent ours.)

In the case before us, to repeat, no prayer for such an instruction was offered, but the question of voluntariness had been raised with sufficient point to require an express admonition to the jury by the Court *sua motu*. Moreover: "The duty of maintaining constitutional rights of a person on trial for his life rises above

mere rules of procedure." *Brown* v. *Mississippi*, *supra*, at 287.

The order is affirmed and the matter remanded to the District Court for final disposition.

Affirmed.

INSTRUCTIONS GIVEN IN THE TRIAL COURT

Taken from the Transcript of the Record Filed in the District Court as Petitioner's Exhibit Number 1

By Mr. Baker:

The defendant now objects to the giving of State Instruction No. 2-A on the ground that it overlooks and does not contain the other findings which the jury may arrive at, namely, manslaughter, and involuntary manslaughter.

By Mr. Daugherty:

The state objects to defendant's Instruction No. 1 or to that portion of it which defines voluntary manslaughter and involuntary manslaughter on the grounds that such instruction does not conform to the evidence in the case. There is no evidence whatsoever to warrant the returning of a verdict of

page 275] voluntary or involuntary manslaughter.

By the Court:

I am amending this instruction.

Defendant's Instruction No. 2 as offered by the defendant and given by the Court, reads as follows:

DEFENDANT'S INSTRUCTION NO. 2

The Court instructs the jury that every material fact in the indictment must be proved beyond a reasonable doubt, and if you find the State of West Virginia has failed to prove every material fact beyond a reasonable doubt, then the court directs you to find the defendant not guilty.

Given: Signed: Ernest E. Winters, Judge.

Defendant's Instruction No. 5 as offered by the defendant and given by the Court, reads as follows:

In the Common Pleas Court of Cabell County, West Virginia.

page 276] DEFENDANT'S INSTRUCTION NO. 5

The Court instructs the jury that in all your deliberations you must bear in mind that the accused is presumed to be innocent of any offense charged against him in the indictment in this case, and this presumption goes with him through every stage of the trial, and the burden is on the State to overcome this presumption of innocence and prove and establish his guilt beyond a reasonable doubt; the Court further instructs you that no mere preponderance of evidence is sufficient upon which to base a conviction, nor is it enough that you may believe the accused is probably guilty, but you must be convinced beyond a reasonable doubt by the evidence adduced upon the witness stand that the de-

fendant is guilty as charged in the indictment beyond a reasonable doubt.

Given: Signed: Ernest E. Winters, Judge.

State v. Stafford, 89 W. Va. 301, 109 S. E. 326.

Lee, Page 202, Sec. 621 (3).

page 277] Defendant's Instruction No. 6 as offered by the Defendant and given by the Court, reads as follows:

DEFENDANT'S INSTRUCTION NO. 6

The Court further instructs the Jury that the presumption of innocence is not a mere form, to be disregarded by the jury at pleasure, but it is an essential and substantial part of the law of the land, and binding on the jury in this case; and it is the duty of the jury to give the defendant in this case the full benefit of such presumption, and they should acquit the defendant unless they believe from the evidence in this case beyond all reasonable doubt that the accused is guilty as charged in the indictment.

Given: Signed: Ernest E. Winters, Judge.

(Lee, Sec. 623).

Defendant's Instruction No. 7 as tendered by the defendant and given by the Court, reads as follows:

page 278] DEFENDANT'S INSTRUCTION NO. 7

The Court instructs the jury that if they find there is a conflict in the evidence in this case on any fact or circumstance tending to establish the guilt or innocence of the defendant, a part of which is in favor of the theory of the State and a part is in favor of the theory of the defendant, and the jury should entertain a reasonable doubt as to which is true, then it is the duty of the jury in arriving at their verdict to adopt the evidence, theory and conclusion most favorable to the accused.

Given: Signed: Ernest E. Winters, Judge.

(Lee, Vol. 2. Sec. 1532).

Defendant's Instruction No. 8 offered by the defendant and given by the Court reads as follows:

DEFENDANT'S INSTRUCTION NO. 8

page 279] The Court instructs the jury that in arriving at a verdict in this case they are the sole and exclusive judges of the evidence and the credibility of each and every witness introduced in this case; that the jury has the right to disregard the testimony of any witness, or witnesses, who in the opinion of the jury have testified falsely in this case, or to give to the testimony of any witness, such weight as in the opinion of the jury the same may be entitled to under all the circumstances of this case, and in ascertaining such weight the jury may take into consideration the

character, motive, or anything else sourrounding the witness, or his testimony, as disclosed by the evidence and circumstances in the case; that in passing upon the credibility of witnesses they may take into consideration the reasonableness or unreasonableness of their statements, their apparent bias or prejudice, as well as their interest in the outcome of the case, if any, as well also as their intelligence or lack of intelligence and their demeanor while upon the witness stand and from these and other facts and circumstances appearing in the case, the Jury may give the evidence of any witness or witnesses only such credit as the jury may think such testimony entitled to, because the Jury is the sole judge of the evidence, as well as the credibility of the witnesses who testify in the case.

Given: Signed: Ernest E. Winters, page 280] Judge.

State vs. Huffman, 69 W. Va. 770, 73 S. E. 292, Lee Sec. 767 (2).

Defendant's Instruction No. 9 as tendered by the defendant and given by the Court, reads as follows:

DEFENDANT'S INSTRUCTION NO. 9

The Court instructs the jury that upon the trial of the criminal case by a jury the law contemplates the concurrence of twelve minds in the conclusion of guilt before a conviction can be had. Each individual juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can rightly consent to a verdict of guilty. Each juror should feel the responsibility resting upon him as a member of the jury and if any

individual juror, after having duly considered the evidence in the case, the instruction of the court, and arguments of counsel, and consulting with his fellow jurors, should entertain a reasonable doubt of defendant's guilt, he is not compelled to surrender his own convictions simply because all, or some, of the other jurors entertain a different opinion.

page 281] Given: Signed: Ernest E. Winters, Judge.

(Lee. Vol. 2, Sec. 1525).

Defendant's Instruction No. 11 as tendered by the defendant and given by the Court, reads as follows:

DEFENDANT'S INSTRUCTION NO. 11

The court instructs the jury that the indictment in this case is not to be considered by the jury in the slightest degree indicative of the guilt of the defendant and while the jury has the right to take the indictment to their room yet they shall not consider the indictment as being any evidence whatever of the guilt of the defendant and it is not to be considered by them as having any weight whatever as evidence against the defendant in this case, as the indictment is merely a formal charge for the purpose of putting him upon his trial; and no juror should permit himself to be influenced against the defendant because of, or on account of, the indictment in this case.

Given: Signed: Ernest E. Winters, Judge.

State v. Stafford, 98 W. Va. 301, 109 S. E. 326.

State v. Huffman, 69 W. Va. 770, 73
page 282] S. E. 292.

State v. Wiley, 97 W. Va. 260, 125 S. E. 83.

Defendant's Instruction No. 13 as tendered by the defendant and given by the Court, reads as follows:

DEFENDANT'S INSTRUCTION NO. 13

The Court instructs the jury that before you can return a verdict of guilty against the defendant in this case the prosecution must establish the corpus delicti beyond all reasonable doubt by clear and positive evidence. In other words, it must be proved beyond such reasonable doubt that the deceased died as the result of a criminal act and that this criminal act was committed by the accused, and the court instructs you that both of these necessary facts must be proven beyond a reasonable doubt, and in addition thereto the court instructs you that the evidence of the defendant having committed the criminal act that resulted in the death of the deceased must be so clear and convincing as to exclude any reasonable hypothesis of any other cause of death.

Given: Signed: Ernest E. Winters, Judge.

page 283] Defendant's Instruction No. 15 as tendered by the defendant and given by the court, reads as follows:

DEFENDANT'S INSTRUCTION NO. 15

The Court instructs the jury that if there is any one essential fact, proved to the satisfaction of the jury

which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt, and the jury should find the defendant not guilty.

Given: Signed: Ernest E. Winters, Judge.

Defendant's Instruction No. 16 as tendered by the defendant and given by the Court, reads as follows:

page 284] DEFENDANT'S INSTRUCTION NO. 16

The Court instructs the jury that the defendant, Ernest Stevenson, had the right to testify in his own behalf, and the jury have no right arbitrarily to disregard or disbelieve his evidence in whole or in part merely because he is on trial charged with crime, but it is the duty of the jury to weigh and consider his evidence the same as that of any other witness, and give to his evidence such weight and credit as they think the same is entitled to, and to weigh his evidence under the same rules as they weigh the evidence of other witnesses testifying in this case.

Given: Signed: Ernest E. Winters, Judge.

Defendant's Instruction No. 3 as tendered by the defendant and given by the Court, reads as follows:

DEFENDANT'S INSTRUCTION NO. 3

The Court instructs the jury that in this state our statute establishes two degrees of the
page 285] crime of murder, and provides that all wilful, deliberate and premeditated killing shall be murder in the first degree. Therefore, the Court instructs the jury that the evidence in the trial

of this case tending to prove that the accused was intoxicated at the time of the killing is competent for the consideration by the jury upon the question of whether the accused was in such a condition of mind, at the time of such killing, as to be capable of deliberation and premeditation.

Given: Signed: Ernest E. Winters, Judge.

State v. Hertzog 5,5 W. Va. 83, 46 S. E. 792.

Defendant's Instruction No. 1, as amended by the Court and given by the Court reads as follows:

DEFENDANT'S INSTRUCTION NO. 1

The Court instructs the jury that one of three verdicts may be found under the indictment in this case if the evidence so warrants; (1) Murder in the first degree, (2) Murder in the second degree, (3) not guilty.

page 286] The Court further instructs the jury that murder in the first degree is when one person kills another person by poison, lying in wait, imprisonment, *starbing*, or by a wilful, deliberate and premeditated killing, or in the commision of or attempt to commit arson, rape, robbery, or burglary, and that all other murder is murder of the second degree.

Given as amended: Signed: Ernest E. Winters, Judge.

Defendant's Instruction No. 1 as tendered by the defendant and before amendment by the court, read as follows:

DEFENDANT'S INSTRUCTION NO. 1

The Court instructs the jury that one of five verdicts may be found under the indictment in this case if the evidence so warrants; (1) murder in the first degree, (2) murder in the second degree, (3) voluntary manslaughter, (4) involuntary manslaughter, and (5) not guilty.

The Court further instructs the jury
page 287] murder in the first degree is when one person kills another person by poison, lying in wait, imprisonment, starving, or by a wilful, deliberate and premeditated killing, or in the commission of or attempt to commit arson, rape, robbery, or burglary, and that all other murder is murder of the second degree; that voluntary manslaughter is when one person unlawfully kills another person without malice, but under sudden excitement and heat of passion; that involuntary manslaughter is when one person while engaged in an unlawful act, unintentionally causes the death of another person, or when, engaged in a lawful act, unlawfully causes the death of another person.

The Court further instructs the jury that murder in the first degree is punishable by death, or confinement in the penitentiary of this state for life, as the jury shall find in their verdict; that murder in the second degree is punishable by confinement in the penitentiary of this State not less than five nor more than eighteen years; that voluntary manslaughter is punishable by

confinement in the penitentiary of this State not less than one nor more than five years; that involuntary manslaughter is a misdemeanor and punishable by imprisonment in the County jail or fine, or by both, in the discretion of the Court.

Lee Criminal Trials in the Virginias, Section 1342, 1 W. Va. Code c-61, Art. 2, Section 1, (Michie's 5916).

By Mr. Daugherty:

The State objects to defendant's In-
page 288] struction No. 1 or to that portion of it which defines voluntary manslaughter and involuntary manslaughter on the grounds that such instruction does not conform to the evidence in the case. There is no evidence whatsoever to warrant the returning of a verdict of voluntary or involuntary manslaughter.

By the Court:

I am amending this instruction and will give it as amended. (The instruction was given as heretofore set out).

The State now offers State's Instruction No. 2-A, and State Instruction No. 2-A as amended and given by the court, reads as follows:

STATE'S INSTRUCTION NO. 2-A

The Court further instructs the jury that murder in the first degree is punishable by death, or confinement in the penitentiary of this State for life, as the jury shall find in their verdict, and the Court further in-

structs the jury that if you should find the defendant guilty of murder in the first degree you
page 289] may, in your discretion, further find that he be punished by confinement in the penitentiary, and if such finding be not added to your verdict the judgment rendered thereon by the Court would be that the defendant be punished with death, and if such further finding is added, the judgment rendered thereon by the Court would be that he be confined in the penitentiary during h. 'ife; and that murder in the second degree is punishable by confinement in the penitentiary of this State not less than five nor more than eighteen years.

JUDGMENT

Filed and Entered, April 28, 1964.

UNITED STATES COURT OF APPEALS
for the
FOURTH CIRCUIT

No. 9202.

Ernest Stevenson,
Appellee,

vs.

Otto C. Boles, Warden of the
West Virginia State Penitentiary,
Appellant.

Appeal from the United States District Court for the Northern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Northern District of West Virginia, *and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the order *of the said District Court appealed from, in this cause, be, and the same is hereby,* affirmed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Northern District of West Virginia, at Wheeling, for further proceedings consistent with the opinion of the Court filed herein.

April 28, 1964.

J. Spencer Bell,
United States Circuit Judge.